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CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 24

HERBERT BROWNELL, JR., Attorney General of The United States, as Successor to the Alien Property Custodian,

Petitioner

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under Indenture dated the 21st day of March 1928, Between Charles L. Cobb and The Chase National Bank of the City of New York, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK (now The Chase Manhattan Bank) as Trustee under Indenture dated the 21st day of March 1928, between Charles L. Cobb and The Chase National Bank of the City of New York

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Opinion Below

The opinion of The Supreme Court of the State of New York, New York County (R. 338-39; New York Law Journal, May 28, 1954, p. 7) is not officially reported. That court's findings of fact and conclusions of law appear at (R. 150-

168). Neither the Appellate Division, which affirmed the Supreme Court nor the Court of Appeals which denied a motion for leave to appeal, wrote an opinion.

Question Presented

The question before the Court is whether the principal of the trust referred to in the Petitioner's brief should be transferred to the Attorney General as Successor to the Alien Property Custodian.

The answer to this question depends upon the validity of the so-called Amended Vesting Order; the effect of the former judgment in this case; the construction to be given to the Trading with the Enemy Act and its impact on trust property. We believe that the Court below has already determined in the prior case that under the Trading with the Enemy Act trust powers and functions cannot accrue to the Office of Alien Property by reason of any vesting order.

Statement

The Attorney General in his statement of facts is in the main accurate. However, he neglects to mention that in the previous action a determination was made by Mr. Justice Schreiber that the persons to whom the trust belonged could not be ascertained until the termination of the trust. Nor does he point out the fact that notwithstanding this determination, the Attorney General made a finding that the trust belonged to enemy nationals and on that finding he purported to vest the trust in himself.

In 1944 an action was brought on the Equity side of the New York Supreme Court by the Trustee of this trust for an accounting and for instructions. While that suit was pending the Alien Property Custodian by Vesting Order #4551 vested all the right, title and interest and claims in the trust, of all of the defendants named in that action.

This Vesting Order reads in its material parts as follows:

"That the property described as follows:

"All right, title, interest and claim of any kind or character whatsoever of * * * in and to the trust established under a certain indenture of trust dated March 21, 1928 between Charles L. Cobb and The Chase National Bank of the City of New York,

"is property payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely, * * *

"That such property is in the process of administration by The Chase National Bank of the City of New York, as Trustee of the trust established under an indenture of trust dated March 21, 1928 between Charles L. Cobb and The Chase National Bank of the City of New York, acting under the judicial supervision of the Supreme Court of the State of New York, in and for the County of New York;" (R 249-250)

* * * * *

"HEREBY VESTS in the Alien Property Custodian the property described above, to be held, used, administered, * * *" (R. 250)

Thereafter the Alien Property Custodian intervened by petition in the said action. His petition was granted and an order was made by the New York Supreme Court, bringing him in as an intervening defendant. The Attorney General was thereafter substituted as an intervening defendant. He filed an answer asking the New York Court of Equity to construe the trust agreement and to grant him certain affirmative relief. This relief was not granted and a judgment was entered on January 30, 1948 (R. 155-158). The Attorney General appealed to the Appellate Division of the New York Supreme Court, and upon the affirmance of the judgment by the Appellate Division he appealed to

the Court of Appeals of the State of New York. In the Court of Appeals the Attorney General, referring in his brief to the broad powers given to the Attorney General under the Trading with the Enemy Act to seize property, demanded in the alternative that the Court of Appeals determine that the entire trust fund should be paid over to him. The Court of Appeals affirmed without opinion and no appeal or petition for a writ of certiorari was filed by the Attorney General from the judgment of affirmance of the Court of Appeals. (*Chase National Bank* v. *M Grath*, 301 N. Y. 602)

The Attorney General submitted himself to the jurisdiction of the Court of Equity of the State of New York by becoming an intervening defendant in the 1944 action.

Three years passed after the judgment of affirmance of the New York Court of Appeals and then the Attorney General "amended" his Vesting Order #4551. This "amendment" was made eleven days before President Eisenhower was to announce to Herr Adenauer that there would be no more seizures by the Attorney General. Instead of making use of a "turn over directive" which was the course followed by the Attorney General in the Zittman case and in the Singer case, he "amended" Vesting Order #4551 to make it, as he says a "res vesting order", which reads in its material parts as follows:

> "Vesting Order 4551, executed January 29, 1945, is hereby amended to read as follows:
>
> "Under the Authority of the Trading with the Enemy Act, as amended (50 U. S. C. App. and Sup. 1-40); Public Law 181, 82nd Congress, 65 Stat. 451; Executive Order 9193, as amended by Executive Order 9567 (3 CFR, 1943 Cum. Supp.; 3 CFR 1945 Supp.); Executive Order 9788 (3 CRF, 1946 Supp.) and Executive Order 9989 (3 CRF 1948 Supp.), and pursuant to law, after investigation, it is hereby found:
>
> "1. That Bruno Reinicke, Jr.; Elisabeth Reinicke; Bruno Carl Reinicke; Robert Hans Reinicke; Johanne Maria Margarete Elisabeth Reinicke;

Klaus Reinicke; Hans Egon Schwarzburger; Ilse Schwarzburger Roth; Hans Adolf Roth; Heide Roth; Hans Eberhardt Schwarzburger; Karla Maria Rott vom Baur; Fritz vom Baur; Gerd vom Baur; Roland Rott; Rose Lore Rott; Fritz Reinicke; Gertrud Ernst; Ella Schwarzburger; Charlotte Rott; the child or children names unknown, of Bruno Reinicke, Jr., and Elisabeth Reinicke; descendants of any deceased child or children, names unknown of Bruno Reinicke, Jr., and Elisabeth Reinicke; issue, names unknown, of Gertrud Ernst; issue, names unknown, of Charlotte Rott; issue, names unknown, of Ella Schwarzburger; and the heirs at law, names unknown, of Bruno Reinicke, Jr., who there is reasonable cause to believe on or since December 11, 1941, and prior to January 1, 1947, were residents of Germany, are and prior to January 1, 1947, were nationals of a designated enemy country (German);

"2. All property in the possession, custody or control of the Chase National Bank of the City of New York under a certain indenture of trust dated March 21, 1928, between Charles L. Cobb and the Chase National Bank of the City of New York, as subsequently amended, subject to expenses of administration, is property which is and prior to January 1, 1947, was within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid nationals of a designated enemy country (German);

"and it is hereby determined:

"3. That the national interest of the United States requires that the persons identified in subparagraph 1 hereof be treated as persons who are and prior to January 1, 1947, were nationals of a designated enemy country (German).

"All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and it being deemed necessary in the national interest,

"THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

The Trustee was requested to account by the Attorney General (R. 57-58). It began an action for an accounting in the same court that had passed upon the questions submitted in the previous action, at the same time asking for instructions and requesting that it be directed to retain a reserve for the prosecution of a suit against the Attorney General to recover the trust fund in case the Court should hold that the Attorney General was entitled to the trust fund. The Trustee felt that an immediate suit was necessary in such event in view of *Isenberg* v. *Trent Trust Co.*, 26 Fed. 2d 609. The Attorney General appeared and answered the complaint requesting that the court determine that the fund should be paid over to him. Both the trustee and the Attorney General were entitled to a judicial accounting (*Kahn* v. *Garvan*, 263 Fed. 909).

The New York Supreme Court as appears from the opinion (R. 338-339) found that it could not determine that the "Amended Vesting Order" gave the Attorney General the right to take over the trust fund because it was decided in 1948 that the Attorney General was not entitled to the income of the trust or to exercise any powers with respect to it; and that the ownership of the trust fund could not be determined until the termination of the Trust.

This is what the learned Judge said (R. 338-339):

"Whatever may be the difference between the original and the amended vesting orders, the indisputable fact remains that there is at least one person now in

being who is a United States citizen and who may well become entitled to the entire principal of this trust upon its termination." • • •

"The attorney general will be fully protected and complete justice done to all parties herein, particularly in view of the direction in the instant trust indenture (valid under Illinois law) that all income is to be accumulated and added to principal, by a direction to be inserted in the judgment to be entered herein that no payments of principal or income are to be made by the trustee to any beneficiary without sixty days' written notice to the attorney general, such notice to be given by registered mail."

It can be seen that the learned judge decided in effect that the Attorney General had made a finding of fact that was contrary to the law of the case and the previous determination. It is also clear from this opinion that the learned judge wanted to protect the United States in every way possible so that when it should be determined some day in the future as to who was entitled to the fund, the Attorney General as Successor to the Alien Property Custodian must have notice of any such proceeding by registered mail.

In *Chase National Bank* v. *Reinicke*, 76, N. Y. Supp. 2nd, 63, the Court had said at page 65:

"At this time remainder interests are essentially contingent and the identity of the ultimate remaindermen is unascertainable. The Attorney General's property rights are simply co-extensive with those of the beneficiaries whom he has succeeded. This precludes any power to change the terms of the original indenture and to confer on the Attorney General property rights superior to those of his predecessors in interest."

The Position of the Respondent Trustee

The plaintiff-respondent as Trustee is charged with the duty of protecting its trust against unlawful incursions by anyone including the Attorney General of the United States

as Successor to the Alien Property Custodian; and for that reason the Trustee opposes the demand made by the Attorney General in his answer that the principal of the trust be paid over to him.

The Trustee's position is founded upon the premise that the former judgment is *res judicata;* that the purported amended vesting order is a nullity; that it is not authorized by the Trading with the Enemy Act and is contrary to the law of the case as heretofore decided by the New York Court and lastly that the alleged *res* vesting order was unconstitutional and void because the alleged order was made after the war was over.

Summary of Argument

1. The 1953 Vesting Order is a nullity.

2. The amended Vesting Order failed to vest the trustee's title as appears from the text of the amended vesting order itself.

3. The amended Vesting Order is unconstitutional because it was made after the termination of the war with Germany and is based upon a determination as to enemy ownership which is contrary to the facts, contrary to the law and which was made in bad faith.

4. Congress did not intend to put the United States in the position of a trustee under a trust indenture with all the duties incident thereto or to such trust funds held for future distribution to persons not presently ascertainable.

5. The Supreme Court at Special Term had jurisdiction of the subject matter and of the Attorney General for all purposes.

6. A consideration of points contained in the brief of the Attorney General and of certain cases relied on by him.

POINT I

The Amended Vesting Order is a Nullity.

The provisions of Section 7(c) of the Trading with the Enemy Act which authorize the vesting of interests and property belonging to enemy nationals requires that the President or his agent shall make a finding that the persons who are the stated owners of the property, are enemy nationals and that the property to be vested belongs to such enemy nationals.

If these two findings do not exist there is no vesting order because the statute has not been complied with.

In the case of the so-called Amended Vesting Order there is a finding of the agent of the President, in this case, an official in the office of the Attorney General, in Section 2 thereof, that all property in the possession * * * of The Chase National Bank as Trustee * * * subject to expenses of administration, is property which is and prior to January 1, 1947, was within the United States owned * * * by the aforesaid nationals of a designated enemy country.

The Attorney General from the experience of his office in the previous Reinicke case, knew that the Supreme Court of the State of New York, in an opinion that was affirmed by the Appellate Division and by the Court of Appeals had determined that there could be no ownership of this property until the termination of the trust and that was to take place some time in the future upon the expiration of two lives, namely, of Mr. and Mrs. Reinicke, both of whom are living.

This means that there had been a determination in the previous action, that none of the parties interested in the trust owned any part of it. Nevertheless, notwithstanding the terms of the trust agreement from which it is clear that there can be no ownership until the termination of the trust, nowithstanding the determination of Judge Schreiber in the former Reinicke case, that all of the interests of the trust were contingent, the Attorney General proceeded to make a determination which was contrary to law, contrary

to fact and contrary to the law and facts as found in the previous action. That determination was that the persons designated in the so-called Amended Vesting Order were the owners of the property described in Section 2 of the Order, that being the trust fund.

The basis for the determination that the property should be vested was made upon the patently false determination which was known to be false by the Attorney General's office. Furthermore the fact that the Trustee had the legal title to the trust fund was also ignored by the Attorney General in his amended vesting order. A reading of the amended vesting order shows no attempt to "vest" the trustee's legal or equitable title to the trust fund. In fact the amended vesting order is little different from the original vesting order; and as the former vesting order failed to vest fiduciary powers so the amended vesting order fails to vest the fiduciary's powers or title to the trust.

From the foregoing it follows ineluctably that the so-called Amended Vesting Order is a nullity.

POINT II

Consideration of the Effect of the Alleged Amended Vesting Order.

For the purpose of argument only, we shall consider the alleged amended vesting order without regard to its obvious invalidity.

This Court has had occasion to pass upon the effect of the two kinds of Vesting Orders which have been made by the Alien Property Custodian in this case, in *Zittman* v. *McGrath*, reported at 341 U. S. 471.

In that case which was decided in favor of the Attorney General the Court considered the effect of a right, title and interest vesting order and a res vesting order. In the first type of order the Attorney General acting in pursuance of the provisions of the Trading with the Enemy Act, vested the interest of the enemy national. That is to say, he steps

into the shoes of the enemy national. The Court below, has in the previous case affecting this trust said just that.

The other type is the *res* vesting order where the Attorney General as Successor to the Alien Property Custodian vests certain property. The Supreme Court has said in the Zittman case that what happens when a *res* vesting order is made, is that the Attorney General steps into the shoes of the possessor of the property.

The effect of the right, title and interest vesting order has been made clear by this Court in the former case, where this Court said at page 65:

> "The Attorney General's property rights are simply co-extensive with those of the beneficiaries whom he has succeeded. This precludes any power to change the terms of the original indenture and to confer on the Attorney General property rights superior to those of his predecessors in interest."

Following the *Zittman* case and the analogy laid down by the Court below in the previous case, we come to the unavoidable conclusion that if the *res* Vesting Order in this case is to be given any effect and is not invalid as stated above, then the only effect it could be given is that the Attorney General steps into the shoes of The Chase National Bank of the City of New York as Trustee subject to all of the limitations imposed upon the Trustee in the exercise of its property rights as Trustee of the trust, by the Indenture of Trust.

This of course, presents a paradox, if it is to be conceded that the Attorney General as Successor to the Alien Property Custodian was ever intended by Congress to be given the right to seize the principal of existing trusts held by American Trustees for beneficiaries whose interests can not yet be ascertained as they are in the instant case.

The Court below so held in the previous case where the Court said:

> "The Settlor intended that such income as is not used for his children should be accumulated for the

benefit of those who are ultimately entitled to the corpus of the trust upon its termination. At this time, remainder interests are essentially contingent and the identity of the ultimate remaindermen is unascertainable." (*Chase National Bank* v. *Reinicke*, 76 N. Y. Supp. 2nd, 63 at page 65).

The paradox that arises, if under the Trading with the Enemy Act the Office of Alien Property is entitled by *res* Vesting Order to step into the Trustee's shoes, is eliminated completely if a reasonable construction is placed upon the Trading with the Enemy Act, with respect to the corpus of a trust like this. Such construction would be reasonable if the Attorney General's rights to seizure are deemed to be limited to the interests of enemy nationals in the trust fund.

We would have no quarrel with this. We think such construction is in accord with common sense and also in accordance with the previous decision of this Court where it was held that the fiduciary powers retained by Bruno Reinicke did not vest in the Attorney General by his right, title and interest vesting order against Mr. Reinicke; and where this Court also said that the Attorney General has no power to change the terms of the original indenture and to confer upon himself proprietary rights superior to those of his predecessor in interest.

POINT III

Amended Vesting Order Did Not Vest the Trustees Title.

Just as the original vesting order did not vest trust powers, the present amended vesting order did not vest the title of the fiduciary either legal or equitable.

The court below determined in the preceding case that no fiduciary powers had been vested (*Chase National Bank* v. *Reinicke*) supra. In this case the court below was in doubt as to whether anything had been accomplished by the amended vesting order.

We think nothing had been accomplished. There was no attempt to do anything but to declare that enemy nationals owned the trust property and therefore it was vested, paying no attention to the necessity for vesting the title of the trustee, both legal and equitable.

Unless the Office of Alien Property vests the title of the Trustee it cannot step into the Trustee's shoes as it was said by this court in the Zittman case with respect to *res* vesting orders. (*Zittman* v. *McGrath*, 341 U. S. 471), and even then the attorney general can not step into the shoes of the Trustee.

POINT IV

Congress Did Not Intend to Put the United States into the Position of a Trustee Under a Trust Indenture with all the Duties incident Thereto or to Subject Trust Funds Held for Future Distribution to Persons Not Presently Ascertainable to Seizure.

An examination of the terms of the Trading with the Enemy Act with respect to the seizure of property by the Alien Property Custodian shows, we think, that it is not applicable to a trust such as we have here.

Section 5(b) provides that during the time of the war or during any other period of national emergency declared by the President, he may regulate foreign exchange, etc. and the transfer of moneys, and then goes on to say: "And any interest or interests of any foreign country or national thereof shall vest, when and upon the terms directed by the President in such agency or person as may be designated from time to time by the President * * * and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

This section contemplates the making of a vesting order to seize the interests of any enemy nationals or the property itself belonging to an enemy.

In Section 7(c) of the Trading with the Enemy Act there is another provision with respect to the seizure of enemy property. This provision is as follows:

> "(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian, and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act."

It can be seen that this section contemplates the seizure of property of enemy nationals. It does not contemplate the seizure of American property held by an American Trustee for the benefit of persons whose identity cannot presently be ascertained. There is no suggestion in the statute that trust funds whose beneficiaries are to be determined a generation from now are subject to seizure as enemy property by the Alien Property Custodian.

Again Section 12 of the Trading with the Enemy Act which deals with the disposition of property transferred to the Alien Property Custodian shows that the Alien Property Custodian was never intended to step into the shoes of a trustee because that section confers on the Alien Property Custodian, as to property seized, all the powers of a common law trustee and requires and authorizes the sale of the property and the payment over of the proceeds to the Treasury of the United States. It is clear that if the Alien Property Custodian only steps into the shoes of The Chase National Bank he will have no power to do any of these things.

We believe that a consideration of the seizure and vesting provisions in Sections 5(b) and 7(c) referred to above and the administrative provisions of Section 12 referred to above demonstrate that it was never the intention of Congress to authorize the President through his agent to interfere in the administration of trusts of this character.

Such a construction of the Trading with the Enemy Act does not work any hardship on the Office of Alien Property because all of the interests of enemy nationals are subject to vesting by a right, title and interest type of vesting order which gives to the Office of Alien Property when the enemy becomes entitled to it, any part of the income or principal of a trust, the interest in which of such enemy national has been vested.

Furthermore, this is the only orderly and practicable way of seizing enemy interests in a trust fund. It is fantastic to think that the Office of Alien Property can seize a trust fund in which an enemy might have a contingent interest payable after the lapse of a generation and hold the trust corpus not as an entity but as a claim in dollars against the United States Treasury.

In discussing the Points of the Attorney General we will show that the cases referred to by him as supporting his claim that he has the right to vest continuing trusts in himself, do not support his position. We now propose to refer to two cases which show that not every property or interest in property can be seized by the Attorney General as Successor to the Alien Property Custodian.

In *Chase* v. *Reinicke*, 76 N. Y. Supp. 63, in which the previous action which resulted in the 1948 judgment was reported, the Court held that a power given to an enemy alien to direct the investment of the trust did not pass to the Attorney General as Successor to the Alien Property Custodian by reason of his order vesting all interests and rights of the said enemy aliens in the trust. The judgment in the previous action makes this clear where it is determined:

"The said Tom C. Clark, Attorney General as Successor to the Alien Property Custodian has not succeeded to the powers with respect to the management and disposition of the trust lodged in the said settlor, Bruno Reinicke, Jr. and his wife, Elisabeth Reinicke (R. 222).

"The power retained by the said Bruno Reinicke, Jr. to direct the payment of income is a personal power, and the Alien Property Custodian did not succeed to such power by reason of said Vesting Order #4551 (R. 223).

"The powers over the management of the trust fund retained by Bruno Reinicke, Jr. are also personal powers and the Alien Property Custodian did not succeed to said powers by the said Vesting Order." (R. 223).

In *Herter's Estate,* 193 Misc. 602 Affd. 274 App. Div. 979; 300 N. Y. 532, the Attorney General filed a petition in the Surrogate's Court to have an election made by the Attorney General sustained and the widow's share paid over to him.

The deceased was a German national and he died in Germany on March 6, 1945. He was survived by a widow. He left no issue. By his will admitted to probate in New York County, he gave all his property in the United States to his brother, Morris Herter, who was a resident of France. The brother predeceased the Testator. He was a citizen of the United States and left him surviving four children who were all American citizens. These four children claimed to be entitled to the interest given to their father, Morris Herter under the will. The decedent did not make a provision for his widow which complied with the requirements of Section 18 of the Decedent Estate Law.

The widow was in Germany all during the war and was living there when her husband died. Her interests in the estate were vested by Vesting Order dated March 11, 1947 and Amended Vesting Order dated April 29, 1947, whereby

the Attorney General as Successor of the Alien Property Custodian vested "all right, title and interest and claim of any kind or character whatsoever of" the surviving spouse.

Another instrument dated March 26, 1947, was served by the Attorney General on the Executor of the estate. This instrument declares that the Attorney General elects, pursuant to Section 18 of the Decedent Estate Law to take against the will; and to take the provisions given to the widow by law.

In the amended vesting order the Attorney General vested the right of the widow to file an election to take her share in the estate of this decedent, as in intestacy and all other rights and claims of the widow against the estate.

There was a question in the case as to whether the widow's renunciation was effective, but that was not important in deciding the case. The court decided the case on the ground that the Attorney General as Successor to the Alien Property Custodian is not constituted an Attorney in fact for the persons whose interests he vests. He is in no sense a representative of a surviving spouse. The Court held that this right was a personal right and that he, under the laws of the State of New York was not entitled to elect in behalf of the widow.

We think that these two cases indicate that personal and trust powers relating to estates and trusts are not subject to the vesting provisions of the Trading with the Enemy Act. If this is so it follows that the vesting of continuing trusts is also outside the scope of the Trading with the Enemy Act. We also think that the inadequacy of remedy under Section 9(a) of the Trading with the Enemy Act demonstrates that Congress did not intend to authorize the seizure of trust funds held by American trustees as will appear. If this trust is transferred to the Attorney General as Successor to the Alien Property Custodian, then neither the trustee nor any beneficiary will be able to recover the trust or any part of it.

If the trust is paid over to the Attorney General as Successor to the Alien Property Custodian the trustee of course, would have to bring a suit under Section 9(a) of the Trading with the Enemy Act for the recovery of the fund. It will be met by the defense that the trustee has no beneficial interest in the fund and that consequently, it has no right to bring the suit. This is what was decided in *Central Hanover Bank* v. *Markham* 68 Fed. Supp. 829 which we shall discuss later.

The next thing that would happen would be that the Reinicke sons would bring suit and they would be met with the objection which the Attorney General claims has no weight here, that their interests were only contingent and naturally they could not be adjudicated at this time. So that the net result would be that this fund would be held until the termination of the trust after the death of Mr. and Mrs. Reinicke; and that the then remaindermen will probably be all Americans since the three Reinicke children are all in the United States; one already has a child who was born here in 1953. These remaindermen would be met with the objection either that they had not filed a claim on time or that in any case they could not comply with Section 32 of the Trading with the Enemy Act which requires a claimant to prove that he was entitled to the property immediately prior to the vesting thereof.

The lack of any remedy under the Trading with the Enemy Act as to trusts demonstrates that Congress did not contemplate the seizure of trusts, for such lack of remedy would render the Trading with the Enemy Act unconstitutional as to trusts.

POINT V

A Vesting Order Made After the War is Over is Void.

The war between the United States and Germany was terminated on October 19, 1951 by Joint Resolution of Congress #289 approved by the President on October 19, 1951; and yet the Office of Alien Property a year and a half later

purporting to act under the Trading with the Enemy Act which is made possible to Congress only through the war powers conferred upon Congress by the Constitution purports to make use of these war powers.

We believe that the powers of the Office of Alien Property in the matter of vesting property of enemy nationals terminated with the war; and that any vesting order made subsequent to the ending of the war between the United States and Germany was unconstitutional and void.

We are not going to labor this point any further here, because it will be briefed *in extenso* by the learned guardian-ad-litem for Hans Dietrich Schaefer, one of the infant defendants, who was born in this country in August of 1953 and who is a grandson of Bruno Reinicke Jr. and as such clearly has a contingent remainder interest in this trust fund; and who, if we are to give the extraordinary findings of the Office of Alien Property in the so-called Amended Vesting Order any weight, must have been an enemy national.

There were three cases decided after the first World War in which it was held that under language not dissimilar from that of the joint resolution terminating the second World War, that the Alien Property Custodian had no right to vest property after the war.

The three cases in question are the following:

Miller v. *Rouse*, 276 Fed. 715 at page 717;

Matheson v. *Hicks*, 10 Fed. 2d, 872 at page 873;

Sutherland v. *Guaranty Trust Company*, 11 Fed. 2d, 696.

In the last named case, *Sutherland* v. *Guaranty Trust Company*, 11 Fed. 2d, 696, which is referred to by the Attorney General as presumably standing for a proposition favorable to him, was a case in the Circuit Court of Appeals, Second Circuit. The Alien Property Custodian had brought suit against the Guaranty Trust Company pursuant to Section 17 of the Trading with the Enemy Act in which he

sought to recover a bank balance, the demand for which had been made by him after the first world war was ended.

The Court held that the Alien Property Custodian had no power to vest property of enemy nationals after the end of the war; and that a suit under Section 17 to require payment after vesting and demand, would not lie because the vesting and demand was not made by the Alien Property Custodian until after the war had ended.

The other two cases referred to above are to the same effect.

The Attorney General has evaded in his brief the question of unconstitutionality of his so-called vesting order. As an example of this, we point to page 19 of his brief where in footnote No. 15, he endeavors to give the impression that *Sutherland* v. *Guaranty Trust Company*, 11 F. 2d 696 was a case that merely involved some minor aspect of a technical demand. As we have shown above, the Sutherland case was outstanding. It determined that a demand made after the ending of the war was not valid for the purpose of the Trading with the Enemy Act. A demand was tantamount to a vesting order and had to be made before the war ended.

The Attorney General has also taken the position that *Zittman* v. *McGrath*, 341 U. S. 471 and *Brownell* vs. *Singer*, 347 U. S. 403 are directly in point and control. We believe that we have shown the difference between the situation here and the situation in the *McGrath*, *Zittman* and *Singer* cases. We also propose to consider certain cases mentioned by the Attorney General in his brief. They do not stand for the proposition which he claims they support.

There have been two recent cases involving first a claim that the termination of hostilities ended the Attorney General's right to exercise his vesting powers (*National Savings & Trust Co.* vs *Brownell*, 222 Fed. 2d 395). The second case involved a dictum as to the effect of the joint resolution (*Ladue* v. *Brownell*, 220 Fed. 2d 468).

We merely note these cases here but shall not analyze them. That has been ably done by the said *guardian ad litem*.

POINT VI

The Supreme Court at Special Term had Jurisdiction of the Subject Matter and the Attorney General.

The facts constituting the submission of the Attorney General to the Supreme Court at Special Term and to the other Courts of this State are as follows:

The Supreme Court acquired jurisdiction of the trust and of the Attorney General in the action which resulted in the 1948 judgment. In that case he asked leave to intervene and to file an answer. This request was granted. He took certain positions and litigated the matter to the Court of Appeals. When he made the Amended Vesting Order he served notice on The Chase National Bank of the City of New York as Trustee, that it must account and give him notice of the account and all matters relating thereto. In pursuance of this demand the Trustee brought an action to settle its account, and asked for a direction with respect to turning over the principal of the trust to the Attorney General as he demanded and for leave to reserve a certain fund for taxes and for expenses of a suit against the Attorney General as Successor to the Alien Property Custodian under Section 9(a) of the Trading with the Enemy Act. The Trustee had the right to sue the Attorney General as Successor to the Alien Property Custodian for an accounting and a decree of distribution (*Kahn* v. *Garvan*, 263 Fed. 909). The Attorney General had his time to answer extended from time to time, and in due course he filed an answer which in spite of his denials was a full appearance and in effect a cross-complaint and demand for definite relief.

The rule is that if the United States submits itself to the jurisdiction of a court it is subject to the same rules as other litigants. (*Matter of Thekla*, 266 U. S. 328; *United States* v. *National City Bank*, 83 Fed. 2nd, 236; *Guaranty Trust Co.* v. *United States* 304 U. S. 126).

In *Matter of Thekla*, 266 U. S. 328, the Luckenback Steamship Company had libelled the ship Thekla, for

damages resulting from a collision with the S. S. J. Luckenback. The United States was made libelant on its own motion. It filed a claim "without submitting itself to the jurisdiction of the Court" alleging possession and ownership at the time the libel was filed.

Mr. Justice Holmes held that the District Court had jurisdiction to render judgment against the United States and the United States Shipping Board, saying at page 339:

> "when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter".

In *United States* v. *National City Bank*, 83 Fed. 2d, 23, the United States was substituted as plaintiff for the Russian Government in a case involving a claim for monies deposited by a Russian official. The Circuit Court, Second Circuit said at page 237:

> "This suit is in equity where it is recognized that debts should be paid, and the adjustment of demands by setoff rather than by independent suit is favored and encouraged * * *. The Supreme Court has held independently of any statute that where the United States brings a suit it submits to the application of the same principles which govern other suitors. (Cert. den. 299 U. S. 563.)" To the same effect are *Guaranty Trust Company* v. *United States*, 304 U. S. 126 and *National City* v. *China* 75 Sup. Ct. Rep. 423.

POINT VII

Consideration of Points Contained in the Brief of the Attorney General and of the Cases relied on by him.

The Attorney General's Statement of the facts is on the whole, correct as far as it goes, but we believe that the longer statement of facts set forth above in this memorandum gives a fuller idea of the factual situation which has given rise to the questions that are before the court on this appeal. We now pass to a consideration of the points

contained in the brief of the Attorney General and of the cases relied on by him to the extent that they may be pertinent.

The Attorney General says that the most that could have been decided in the prior suit was that Bruno Reinicke and the others whose interests were vested were not entitled to any part of the trust. He makes a point which is fatal to his own case, because if such persons were not entitled, and it is the fact that the Court determined they were not entitled, then the so-called Amended Vesting Order was a nullity, for the finding of ownership in that order was contrary to the determination of Judge Schreiber in the 1948 opinion.

The Attorney General says that the 1948 judgment could not adjudicate the rights of the Attorney General under the Amended Vesting Order issued in 1953 by the Attorney General. We agree that the 1948 judgment could not adjudicate the Attorney General's rights under the order made five years later if the order were based on new underlying facts. What the 1948 judgment did do was to make a determination that the ownership of the trust could not be determined until its termination. This determination in the prior suit made the Attorney General's determination in his 1953 Amended Vesting Order, of ownership in enemy nationals, contrary to fact and contrary to the 1948 opinion which was binding on the Attorney General.

There are numerous cases cited by the Attorney General to support his point that a question cannot be held to have been adjudicated before an issue on the subject could possibly have arisen. These cases we shall not discuss since they have no bearing on the real point before the court.

The Attorney General asserts that "a right, title and interest Vesting Order" does not prevent a subsequent "*res* Vesting Order" by him. We think that this is doubtful but even if it were so, we do not agree that the Attorney General could make a *res* Vesting Order as to this trust based upon a determination of ownership which was contrary to the 1948 opinion.

The Attorney General says that the Trading with the Enemy Act authorizes the Attorney General to determine ownership. We would agree with that proposition provided that it is made under conditions of war urgency and not in conflict with a prior determination of ownership.

He quotes from *Commercial Trust Company* v. *Miller* 262 U. S. 51 to the effect that • • • the determination of the Custodian is conclusive whether right or wrong. He does not mention the fact that the constitutionality of the Trading with the Enemy Act was sustained in *Central Trust Co.* v. *Garvan* 254 U. S. 554 only because of the remedy set forth in Section 9(a) of the Act which today is not available to a beneficiary of a trust by reason of the restrictions imposed by Section 32 of the Trading with the Enemy Act.

We also agree with this case but we do not agree that the Attorney General's determination of ownership can be contrary to the determination of the Supreme Court in the 1948 action.

The Attorney General refers to *Zittman* v. *McGrath* 341 U. S. 471 where this Court discussed the difference between the two kinds of vesting orders.

In that case, Mr. Justice Jackson delivered the opinion of the court, and said, that in the action involving The Chase National Bank of the City of New York and the Custodian (*Zittman* v. *McGrath*, 341 U. S. 446), the latter stepped into the shoes of the German banks, but that in the Zittman case the Custodian stepped into the shoes of the Federal Reserve Bank as possessor (not the owner) of the credits and funds.

We have no complaint about the rule laid down in that case; but we do object to the use of that case by the Attorney General as support for his illegal vesting order which made a determination of ownership contrary to Judge Schreiber's determination in the 1948 action.

The Attorney General refers to Matter of *Yokohama Specie Bank*, 200 Misc. 610 as having a bearing on the case at bar. That case was affirmed by the Appellate Division and Court of Appeals and ultimately reversed by the Su-

preme Court without opinion in *Brownell* v. *Singer*, 347 U. S. 403, relying on *Zittman* v. *McGrath*, 341 U. S. 471.

In that case the Superintendent of Banks who was the liquidator of the Yokohama Specie Bank, received a letter in which the Attorney General stated that since the funds of the bank which were held unallocated by the Superintendent of Banks were funds which had been vested by the vesting order made several years before and consequently the Superintendent of Banks was directed to transfer that sum to the Attorney General.

The Superintendent of Banks asked for instructions from the Supreme Court and for leave to pay over the balance unallocated, to the Attorney General. This was opposed by one Singer, an assignee of a claim of the Standard Oil Company in excess of $500,000 which arose out of a banking transaction which originated in Japan, and which was the subject of much litigation in the State Courts and in the United States Supreme Court until finally a judgment was entered, holding that Mr. Singer had a claim against the Yokohama Specie Bank.

This claim could not be paid by the Superintendent of Banks because the Attorney General as Successor to the Alien Property Custodian refused to issue the customary license. However, the Superintendent of Banks acting in accordance with his own routine set up a reserve for this claim on his books.

Another request for a license was made to the Attorney General just before the beginning of the proceedings which were the subject of the appeal and this application was denied. The Office of Alien Property then wrote a letter to the Superintendent of Banks informing him that there was no evidence which would justify the issuance of a license and that consequently since the Alien Property Custodian had vested these funds in the past, by the original and only vesting order, the Superintendent of Banks was requested to pay over the fund to the Attorney General as Successor to the Alien Property Custodian.

This was not a case of an amended vesting order. This was a case where the interest of the Japanese Bank had

been vested years before; and the Superintendent of Banks had been given permission to carry out the liquidation of the Japanese Bank in accordance with the New York Banking Law. The situation of Mr. Singer's claim was simply that it had been allowed but was not payable. It was a claim against the fund in the hands of the Superintendent of Banks, but the ownership of the fund in the Superintendent's hands remained unaffected by the judgment determining that Mr. Singer had a claim against the Yokohama Specie Bank.

The lower court refused to authorize the Superintendent of Banks to turn over the funds in its hands to the Attorney General. An appeal was taken to the Appellate Division and affirmed without opinion. A subsequent appeal to the Court of Appeals was affirmed without opinion.

The United States Supreme Court on the authority of the Zittman case, *supra*, reversed the lower court without opinion, the Chief Justice taking no part in the case and three justices, Mr. Justice Jackson, Mr. Justice Frankfurter and Mr. Justice Douglas dissenting, and determined without opinion that the Attorney General as Successor to the Alien Property Custodian was entitled to the fund.

We do not agree with the statement of the Attorney General that the request made to the Superintendent of Banks to transfer the balance remaining unallocated of the Yokohama Specie Bank's fund was a *res* vesting order. In that case the Attorney General's position was that that fund had been vested by the original and only vesting order which he now enforced with a demand for payment.

The whole history of this case which is set forth at some length in the petition of the Superintendent of Banks and the opinion of the Supreme Court shows a careful cooperation between the Alien Property Custodian and the Superintendent of Banks to the end that the Yokohama Specie Bank might be liquidated in accordance with New York law, the purpose being that any funds remaining unallocated to creditors or to expenses would ultimately be paid over to the Office of Alien Property.

It seems to us that these cases are not authorities applicable to the case at bar. No prior determination of ownership had been made as in the case at bar. All that had been determined in the past was that Mr. Singer, the assignee of the Standard Oil Company was a claimant against the Yokohama Specie Bank whose claim should be allowed subject to the procuring of the appropriate licence which the Attorney General refused to issue.

The Attorney General says that when he amended Vesting Order #4551 to a *res* Vesting Order of the trust property, he acted under the authority of Section 5(b) and 7(c) of the Trading with the Enemy Act; and these sections contain provisions which authorize the Attorney General as Successor to the Alien Property Custodian to vest or seize property of alleged enemy nationals. We have no quarrel with this proposition, as to his powers generally under the Trading with the Enemy Act.

However, the statement of the Attorney General that in this case he acted in pursuance of Sections 5(b) and/or 7(c) of the Trading with the Enemy Act is incorrect. What he did was to make an invalid order, purporting to act under these sections, which order was based upon a finding contrary to the finding already made by the Supreme Court of the State of New York in the 1948 action.

The Attorney General says that the correction of errors, whether of law or fact, in the determination upon which a *res* vesting order is made, must be postponed to a subsequent suit under Section 9(a) of the Trading with the Enemy Act.

We do not quarrel with this proposition in so far as "errors" are concerned; but we do not agree that such is the case here where the Attorney General as Successor to the Alien Property Custodian knowingly made a determination of fact which is contrary to the determination of ownership made in the 1948 action.

In his brief the Attorney General referred to the cases mentioned below as standing for the proposition that the

Amended Vesting Order operated as a seizure of the trust fund. We propose to show that these cases had nothing to do with trust funds.

Clark v. *Uebersee*, 332 U. S. 480, was a suit brought by a neutral to recover property which had been vested. The point which the court was required to decide was whether under the wording of the Trading with the Enemy Act as it had been amended to meet the exigencies of World War II, any neutral had any right to bring suit under 9(a). This has nothing to do with the case at bar.

Becker v. *Cummings*, 296 U. S. 74, was a case where the Attorney General questioned the right of a non-enemy claimant to recover under Section 9(a) of the Trading with the Enemy Act because the funds seized had been disbursed before the claim was filed by the non-enemy claimant. The Court held that the non-enemy could recover and reversed the Circuit Court of Appeals.

In this case the Court felt that if it permitted any inadequacy in the remedy because of inadequacies of the Trading with the Enemy Act, doubt would be thrown on the constitutionality of the act.

The Attorney General claims that immunity was not waived by him and he refers to *Minnesota* v. *United States*, 305 U. S. 382, a case in which the United States was made a party defendant in accordance with an established practice in the State of Minnesota, in a suit involving a right of way through Indian lands. The United States had suffered this for many years; but in this case, it appeared specially and contested the jurisdiction. The Supreme Court held that since the United States had not consented to be sued there was no jurisdiction. This case definitely has no relation to the case at bar.

We think that the cases that we have referred to above make it clear that when a Federal Officjal goes into a court and asks for certain relief, he subjects himself to the jurisdiction of that court, just as any other litigant. (*re Thekla; Sutherland* v. *Guaranty, supra*).

The Attorney General then goes on to say that the Court below did not have jurisdiction to make the determination appealed from, and refers to *United States* v. *Shaw*, 309 U. S. 495 in support of this statement.

In that case, the United States filed a claim in the Probate Court to have its claim allowed, and the Court did not allow its claim in full. There was no complaint on that score by the United States.

It had submitted itself to the Court for the purpose of having its claim allowed, and the disallowance of the claim would have been and was within the jurisdiction of the Court.

What the Supreme Court did not permit was the allowance of a cross-claim against the United States by another creditor of the deceased because, said the Court, the Court of Claims has been established for that purpose.

We do not think that the Attorney General's statement that he did not submit to the jurisdiction of this Court has any substance in view of the prayer of his answer (R. 65) and his intervention in the action which resulted in the 1948 judgment.

The Attorney General takes the position that property held in a trust may be vested like any other property.

He then goes on to claim that the decisions have uniformly held that property held in a trust is subject to the Trading with the Enemy Act, to the same extent and the same degree as any other property, and he cites many cases for that proposition. In view of the fact that the cases cited by the Attorney General do not support this position, we think we should show the Court how far from supporting such proposition these cases are.

Central Trust Co. v. *Garvan*, 254 U. S. 554, was a case involving a libel or seizure of securities held by the Central Trust Co. for a German Insurance Company. The fund belonged to the German Insurance Company which had put up this fund in order to enable it to do business in Connecti-

cut and Massachusetts. It was entitled to change the securities in the fund at any time and to receive all of the income.

The fund was a reserve owned by the German company for the benefit of any American claimants against the Company in case of insolvency. The Alien Property Custodian had taken the position that this was property held for a German company and consequently that he could vest it and he did vest it.

The Court held that the Central Trust Co. was required to pay the fund over to the Alien Property Custodian. This was not in any sense a trust but an escrow account held for an enemy corporation.

A consideration of the nature of the so-called trust fund held by Central Trust Co. will show that it is not a trust fund in any true sense. It was a reserve which had been set aside by the German Insurance Company for the purpose of meeting claims of American policy holders in case of bankruptcy. The fund was subject to control by the German Insurance Company which could change securities at any time. It was never used for the payment of policy holders since the German company was in a solvent state. There is no similarity between that case and the case at bar which is a true trust fund which is being held, administered and accumulated until a certain time at which time distribution is to be made.

In *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, suit was brought by the Alien Property Custodian against the appellant Trust Company to require the payment by the appellant of a fund held by the Trust Company for the joint account of an alien neutral and an alien enemy which might be delivered at any time to either or to the survivor upon request. The Alien Property Custodian, since the property was deliverable at any time to an alien enemy, vested it.

The Court held of course, that there was no defense to the action.

There was no trust involved here. It was a custodian account.

Re Miller, 281 Fed. 764 involved an appeal in the matter of an application made by the Alien Property Custodian for an order requiring the trustees under the will of one Dr. Louis Schaefer, to pay to the Alien Property Custodian the income in their hands as trustees.

In this case the testator who was a resident of New York died in 1921 leaving a will creating certain trusts. The Alien Property Custodian had vested the interest of Amalia Janner in the trust after finding that she was an enemy, and a demand was made for the payment to the Alien Property Custodian of all of the right, title and interest of Amalia Janner in the trust estate. The fact was that Amalia Janner was entitled, under the terms of the will, to the entire trust income.

The question as to what property the Attorney General was entitled to vest was not subject to dispute. The point of the case seems to have been that the trustees felt they should oppose the demand of the Alien Property Custodian on the ground that the suit to require the transfer of the income was begun after the war was over.

The Court refused to uphold this objection and the trustee was directed to transfer to the Alien Property Custodian the interest of Amalia Janner in the trust.

As the Court pointed out in that case since the demand made by the custodian upon which the suit was instituted was made after the beginning of the war and prior to the resolution terminating the war, the custodian's right to sue was still in force. This is another case which the Attorney General claims gives him the right as Successor to the Alien Property Custodian to seize trust funds.

In Kahn v. *Garvan,* 263 Fed. 909, the Court held that the trustee of a trust, the interest of which had been seized by the Alien Property Custodian, was entitled to have its account settled in Court and that such trustee had the right to sue the Alien Property Custodian for the settlement of its

account. This case also held that the equitable interest of the beneficiary of the trust was subject to seizure.

It will be noted that this case does not involve a seizure of a trust fund. It only involves a seizure of the interest of the enemy alien in the trust fund.

In Application of Alien Property Custodian (Matter of Viscomi), 270 App. Div. 732, an Italian who had resided in New York and who was declared to be incompetent had a committee appointed for him, and his property in New York was taken over by the committee.

The incompetent went to Italy just before the war to visit his brother, it being hoped that the change of scene might help his mental condition. However, the war supervened and since Viscomi was not only in Italy during the war, but had never become a citizen of the United States, the Alien Property Custodian vested all of his property held by his committee.

A committee is not a trustee. It is only a bailiff; the title of the securities held by the committee is in the incompetent. (C. P. A. 1377; *Matter of Otis*, 101 N. Y. 580)

The Alien Property Custodian vested the incompetent's property in the hands of his committee, and the committee insisted on getting a court order before paying the property over. A motion was thereafter made in the County Court which had jurisdiction of the matter, by the Alien Property Custodian to require the Committee to hand over the securities to the Alien Property Custodian.

There was no question of a trust here, nor was a trust fund seized here.

Keppelmann v. *Palmer*, 91 N. J. Eq. 67, was a case in which certain enemy aliens were remaindermen, of a trust and as such entitled to the principal of a trust fund; and the Alien Property Custodian having vested the interest of the enemy aliens in the trust fund, the Court directed the trustee to transfer to the Alien Property Custodian the property to which the enemy alien was entitled.

In Matter of Young, 204 Misc. 92, a proceeding was brought in the Surrogate's Court of New York County by the Attorney General as Successor to the Alien Property Custodian for an involuntary accounting against a trustee. In that case the Attorney General in his petition recited the fact that orders vesting the right, title and interest of all persons interested in the trust had previously been executed and issued by the Alien Property Custodian.

The decedent in that case, died leaving a will which was admitted to probate in New York County in November of 1943. She directed that her residuary estate be divided into four parts, one of which was left to her brother, the accounting trustee. The other 3 shares were left in separate trusts for the benefit of her two sons and daughter for their lives and directed that upon the death of each child his or her trust fund was to pass to his or her heirs at law or next of kin.

In 1946 the Alien Property Custodian made a determination that the three children were residents and nationals of Germany, and issued a vesting order vesting all interests of the daughter and sons and their respective heirs at law. Thereafter the trustee was directed to pay the income due the three beneficiaries, the 3 children of the testatrix, to the Alien Property Custodian.

Five years after the making of the vesting order the Attorney General as Successor to the Alien Property Custodian issued a so-called turnover directive addressed to the trustee demanding immediate delivery of the property comprising the principal of the three trusts.

We believe that the procedure of the Attorney General in that case was based upon the assumption that since he had vested all the interests in the trust, he was entitled to the trust.

The Attorney General forced an accounting by a trustee and forced a determination that he was entitled to the trust.

The Young case is also interesting because the Surrogate authorized the retention of $25,000 as a reserve to enable the trustee to pursue his claim against the Attorney General as Successor to the Alien Property Custodian after the trust fund had been turned over to him under Section 9(a) of the Trading with the Enemy Act.

The further history of the Young case appears in the opinion below where Judge Schreiber says (R. 338):

> "In Matter of Young, after an appeal had been taken the attorney general stipulated that the principal was to remain with the trustee and that the trustee was to pay him only the income, which admittedly belonged to an enemy alien."

Central Hanover Bank v. *Markham (supra)* is the only case cited by the Attorney General in which a part of the trust was seized apparently without vesting all of the interests in the trust. Here the Alien Property Custodian on October 3, 1942 by Vesting Order 206 vested all rights of anybody in certain shares of the Maywood Chemical Works. Included in these shares were a number of such shares held by the Central Hanover as trustee of a testamentary trust. Upon demand of the Alien Property Custodian the Central Hanover Bank transferred all of the shares held by it in the Maywood corporation to the Alien Property Custodian. It then brought this suit for the recovery of the shares under Section 9(a) of the Trading with the Enemy Act. The shares in question had been held by the plaintiff as trustee for the benefit of the husband and children of the deceased, all of whom were Germans, residing in Germany.

The plaintiff claimed that under New York law the life beneficiary and remaindermen whose interest had all been vested by the Alien Property Custodian would not have the right to terminate the trust as to these shares. The Court felt that all of the rights in the shares had been vested, and all of these rights belonged to the Germans.

Therefore, there was no point in not terminating the trust as to these shares.

The Court also took the view that since no persons had any interest in the trust which needed protection, the prayer of the plaintiff should be denied.

Under Section 9(a) of the Trading with the Enemy Act, any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been transferred to the Alien Property Custodian may bring suit for its recovery. As a condition precedent to any such recovery the party suing under Section 9(a) must demonstrate that he was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian (Section 32, Trading with the Enemy Act).

Let us consider what would happen if a suit were brought by one of the beneficiaries of the Reinicke Trust under Section 9(a). He could not allege that he was the owner of the trust fund immediately prior to its vesting because the owners of the trust cannot be ascertained until its termination. Consequently it would be impossible for any beneficiary to get back any share at the present time.

If the beneficiary however should wait until his interest is vested after the death of Mr. Reinicke and Mrs. Reinicke which may be many years from now, he will then be met with the difficulty either that he did not file his claim on time, or that he failed to prove that he was the owner of the trust immediately prior to its termination (Section 32 Trading with the Enemy Act), so that no beneficiary can recover any part of this trust fund either presently or upon its termination from the Attorney General as Successor to the Alien Property Custodian.

The position of the trustee if it sues, is just as bad. It will be met with the objection that it is only a trustee holding for others who are not presently ascertainable. This objection has been made use of by the Alien Property Custodian to some effect in *Central Hanover Bank* v. *Markham*,

(*supra*), where a suit was brought by a trustee to recover shares that had been seized by the Alien Property Custodian. The court took the view that since the trustee could not show that there were any persons entitled to the trust who were not Germans, who needed protection, the prayer of the trustee should be denied.

The lack of procedural provisions for the recovery of a trust fund are such that we think the lack of remedy tends to make unconstitutional any claim that Congress intended to authorize the seizure of trust funds.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

THOMAS A. RYAN
Attorney for Plaintiff-Respondent
The Chase National Bank of the City of New York (now the Chase Manhattan Bank) as Trustee under Indenture dated the 21st day of March, 1928, between Charles L. Cobb and The Chase National Bank of the City of New York.

THOMAS A. RYAN, ESQ.
VINCENT J. DUNN, ESQ.
of Counsel